No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
JEROME A. MADDEN
Attorneys
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation (FSLIC) may be held liable for damages arising out of an alleged violation of the Due Process Clause pursuant to a right of action implied under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

2. Whether FSLIC, acting as receiver for a failed savings and loan institution, violated the Due Process Clause by dismissing an officer of the institution without affording any opportunity for a hearing.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert L. Pattullo was a defendant in the district court and an appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-741

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 944 F.2d 562. The opinions of the district court granting defendants' motion to dismiss in part (J.A. 47-62) and reinstating defendants FSLIC and Pattullo under Count 1 of the Complaint (J.A. 63-71) are unreported. The ruling of the magistrate denying defendants' motion for summary judgment in part is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1991. A petition for rehearing was denied on June 29, 1992. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on October 27, 1992, and was granted on March 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this brief.

STATEMENT

1. Congress created the Federal Savings and Loan Insurance Corporation (FSLIC) in 1934 to insure the accounts of all federal savings and loan associations and qualifying state-chartered associations. See National Housing Act, ch. 847, § 402(a), 48 Stat. 1256, codified as amended, 12 U.S.C. 1725(a) (1988) (repealed 1989). In addition, Congress provided that FSLIC would be appointed the conservator or receiver of any federally chartered thrift institution in default on its obligations, 12 U.S.C. 1729(b)(1) (1988), and would be authorized to accept appointment as conservator or receiver for defaulting state-chartered, federally insured thrifts. 12 U.S.C. 1729(c)(1)(A) (1988). When acting as receiver or conservator, FSLIC was authorized to (1) "take over the assets of and operate" the thrift, (2) "take such action as may be necessary to put [the thrift] in a sound solvent condition"; (3) "merge [the thrift] with another insured institution," (4) "organize a new Federal association to take over [the thrift's] assets," (5) "proceed to liquidate [the thrift's] assets in an orderly manner," or (6) "make such other disposition of the matter as it deems appropriate," whichever it deemed "to be in the best interest of the association, its savers, and the [FSLIC]." 12 U.S.C. 1729(b)(1)(A) (1988). See generally *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 569 (1989).[1]

[1] With the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, FSLIC was abolished. The Federal Deposit Insurance

2. In 1982, respondent John H. Meyer was the Executive Vice President for Branch Operations of Fidelity Savings and Loan Association (Fidelity), a California-chartered thrift institution whose accounts were insured by FSLIC. Respondent had been employed by Fidelity in various capacities for 16 years. J.A. 72.

In 1979 Fidelity began experiencing severe financial difficulties. J.A. 73. Substantial operating losses had eroded the thrift's net worth from $91,600,000 (as of January 1981) to $19,600,000 (as of March 31, 1982). J.A. 73. By March 1982, Fidelity had borrowed more than $1.3 billion from the Federal Home Loan Bank of San Francisco. J.A. 73. The thrift was losing an average of $5 million a month, at which rate it would exhaust its entire net worth by July 1982. J.A. 73. As a final sign of Fidelity's distress, depositors withdrew more than $70 million from the association during the week of April 5, 1982. J.A. 74.[2] As a result of Fidelity's deteriorating condition, on April 13, 1982,[3] the California Savings and Loan Commissioner seized Fidelity and appointed FSLIC as receiver under state law. J.A. 74. On the same day, the Federal Home Loan Bank Board appointed FSLIC as Fidelity's receiver under federal law. J.A. 74.[4]

Corporation (FDIC) and the Resolution Trust Corporation (RTC) are generally empowered to act as receivers and conservators for federally insured thrift institutions. The authority of FDIC and RTC to act as receivers and conservators is similar to, but generally broader than, the authority granted to FSLIC. See 12 U.S.C. 1821(d), 1821(e) (Supp. III 1991) (FDIC); 12 U.S.C. 1441a(b)(4)(A) (Supp. III 1991) (RTC).

[2] On February 24, 1982, a number of Fidelity employees, including respondent, executed severance agreements with Fidelity purporting to entitle them to a year's pay "in the event that [Fidelity] is subjected to a regulatory merger or take over." J.A. 34.

[3] The court of appeals erred in stating (Pet. App. 2a & n.1) that Fidelity was placed in receivership in 1983. See J.A. 25, 74.

[4] See generally *Fidelity Sav. & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 689 F.2d 803, 805-807 (9th Cir. 1982) (rejecting chal-

FSLIC had a longstanding policy of terminating the employment of senior managers of thrifts for which FSLIC had been appointed receiver. C.A. Supp. Excerpts of Record, 65, 69. See note 30, *infra*. Pursuant to that policy, FSLIC discharged respondent along with his brother (Fidelity's president) and Fidelity's two other Executive Vice Presidents. J.A. 74. Respondent was informed by hand-delivered letter that he was being discharged (J.A. 74), but he was not given an opportunity to contest that decision. J.A. 75.[5]

3. Relying on this Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), respondent filed an action for damages against various defendants, including FSLIC and its Special Representative, Robert L. Pattullo, who had acted on FSLIC's behalf. Respondent alleged that his discharge without a hearing violated his Fifth Amendment right not to be deprived of property without due process of law. J.A. 28-29. Specifically, he alleged that under California law he had a property right to continued employment with Fidelity absent good cause for dismissal, and that FSLIC did not have sufficient grounds to terminate his employment. J.A. 23. In addition, respondent claimed that FSLIC, Pattullo, and the United States were liable for damages in tort for breach of the implied covenant of good faith and fair dealing. J.A. 29-31.

lenge to FSLIC's appointment as Fidelity's federal receiver), cert. denied, 461 U.S. 914 (1983). See also *Fidelity Financial Corp.* v. *Federal Home Loan Bank*, 792 F.2d 1432, 1434 (9th Cir. 1986) (upholding Home Loan Bank's refusal to extend Fidelity further credit), cert. denied, 479 U.S. 1064 (1987); *FSLIC* v. *Angell, Holmes & Lea*, 838 F.2d 395, 396 (9th Cir.) (affirming FSLIC's right as receiver to terminate employment of Fidelity's lawyers), cert. denied, 488 U.S. 848 (1988).

[5] Most of Fidelity's assets and liabilities were sold by FSLIC as receiver the same day to Fidelity Federal Savings and Loan Association of San Francisco (Fidelity Federal), a newly chartered federal thrift, which was ultimately sold to Citicorp. J.A. 74. Fidelity Federal and its ultimate purchaser, Citicorp, did not acquire any of Fidelity's liabilities to respondent. J.A. 75. Those liabilities were transferred to FSLIC in its corporate capacity and ultimately to the FSLIC Resolution Fund. See 12 U.S.C. 1821a (2)(A) (Supp. III 1991).

Prior to trial, the district court held that respondent's common law tort claims against the defendants were barred both by the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), and by the FTCA's exception for claims "arising out of * * * interference with contract rights," 28 U.S.C. 2680(h). J.A. 59-61. The court, however, denied motions to dismiss the *Bivens* claims against FSLIC and Pattullo, and those claims were tried before a jury.

The jury returned a verdict against FSLIC in the amount of $130,000. J.A. 78. In a special verdict, the jury found that respondent had a "legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity" and FSLIC "fail[ed] to provide * * * [respondent] a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination." J.A. 77-78. The jury did not award damages against Pattullo, finding that he was protected from liability under principles of qualified immunity. J.A. 78.

4. The court of appeals affirmed. The court rejected arguments by FDIC, as successor to FSLIC,[6] that the court lacked authority to award tort damages against a federal agency under *Bivens*, and that FSLIC had not violated respondent's constitutional rights.

a. The court of appeals concluded that *Bivens* provides a damages remedy for constitutional violations committed by FSLIC because Congress provided that the agency could "sue and be sued." See 12 U.S.C. 1725 (c)(4) (1988) (empowering FSLIC to "sue and be

[6] Pursuant to Section 401(f)(2) of FIRREA, 103 Stat. 356, FDIC was substituted for FSLIC as defendant in this suit. See 12 U.S.C. 1437 note (Supp. III 1991).

sued, complain and defend, in any court of competent jurisdiction").[7] The court determined that FSLIC's sue-and-be-sued clause constituted a "general waiver" of the government's immunity from suits for damages, Pet. App. 5a, which entitled respondent to damages for due process violations.

The court acknowledged that a sue-and-be-sued clause cannot be construed as a waiver of sovereign immunity for all tort claims, because Section 2679(a) of the FTCA expressly limits the scope of such waivers. 28 U.S.C. 2679(a). Under that section, a sue-and-be-sued clause "shall not be construed to authorize suits against [a] federal agency on claims which are cognizable under section 1346(b) of this title." 28 U.S.C. 2679(a). Pet. App. 6a. The court of appeals nevertheless found that the FTCA's limitation on "sue and be sued" clause waivers was inapplicable here. The court reasoned that Section 1346(b) authorizes damages only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Because a private person would not be liable for a constitutional violation, the court concluded that such a claim is not "cognizable" within the meaning of Section 2679(a). Pet. App. 7a, 11a.

b. The court also concluded that respondent's dismissal without a hearing violated due process. Pet. App. 21a-28a. The court found that California law provided respondent with a property interest in continued employment absent good cause for termination. Pet. App. 22a-23a. The court rejected FDIC's argument that any such property interest was negated by the statutory and regulatory scheme governing federal thrift receiverships, which permitted FSLIC to terminate indefinite employment contracts. The court stated that "[t]he fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." Pet. App. 26a. Accordingly, the court held that FSLIC was not absolved of its constitutional duty to provide respondent with a hearing on the question whether he should have been terminated. Pet. App. 28a.[8]

[7] The charters of both FDIC and RTC include sue-and-be-sued clauses. See 12 U.S.C. 1819 Fourth (Supp. III 1991) (FDIC); 12 U.S.C. 1441a(b)(9)(E) (Supp. III 1991) (RTC).

SUMMARY OF ARGUMENT

I. In 1971, this Court held in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, that the Constitution vested federal courts with authority to recognize an implied cause of action for damages against federal officials who deliberately engaged in unconstitutional conduct. For the first 20 years after *Bivens* was decided, no appellate court held that the remedy recognized in *Bivens* could be expanded to provide a cause of action directly against a federal agency. In this case, however, the court of appeals concluded that any agency with authority to sue and be sued is subject to damages for constitutional violations under *Bivens*. The court reached that result even though the same claim, if pled under state law tort principles, would be barred by the FTCA. The decision should be reversed because the federal courts have no authority to recognize an implied damage remedy against a federal agency for two independent reasons. First, Congress did not waive the immunity of federal agencies, including sue-and-be-sued agencies, for suits for damages for constitutional tort claims. Second, the substantive law relied upon, the procedural guarantee of the Due Process Clause, cannot be read as "mandating" compensation against the

[8] Respondent filed a cross-appeal challenging the jury's determination that Special Representative Pattullo was immune from damages. The court of appeals upheld that aspect of the jury's verdict, finding that Pattullo had violated no clearly established law. Pet. App. 33a. This Court denied respondent's cross-petition for certiorari to review that ruling. *Meyer* v. *Pattullo*, 113 S. Ct. 1578 (1993).

federal government, *United States* v. *Testan,* 424 U.S. 392, 402 (1976), and the courts accordingly have no authority to imply a damages remedy under *Bivens* even as to agencies that have waived sovereign immunity.

A. The court of appeals conceded that this action would be barred by the FTCA, which generally governs tort actions against the federal government and its agencies. The court held, however, that when Congress provided that FSLIC could sue and be sued, it intended to waive sovereign immunity for constitutional tort claims. That result is inconsistent with the language and purposes of the FTCA and this Court's cases construing the scope of the waiver effected by sue-and-be-sued clauses.

Section 2679(a) of the FTCA, 28 U.S.C. 2679(a), provides that sue-and-be-sued clauses "shall not be construed" to "authorize" any "claims which are cognizable under [the jurisdictional provision of the FTCA]," and that the "remedies provided * * * shall be exclusive." There is only one reasonable interpretation of that language. All claims against federal agencies that sound in tort are "cognizable" under the FTCA regardless of whether the statute permits compensation for those claims. This Court has not construed the term "cognizable," used elsewhere in the FTCA, to refer solely to tort claims that can provide a basis for recovery, *Hubsch* v. *United States,* 338 U.S. 440 (1949). In analogous circumstances, the Court has held that the FTCA provides the exclusive remedy for claims sounding in tort even when recovery is barred by the terms of the statute. *United States* v. *Smith,* 111 S. Ct. 1180 (1991).

The interpretation adopted by the court of appeals undermines the uniformity that Section 2679(a) was intended to create. Under the court's analysis, a variety of tort claims that cannot be maintained against most federal agencies can nevertheless be brought against agencies with sue-and-be-sued clauses. Yet Congress enacted Section

2679(a) for the very purpose of making the FTCA the sole avenue for tort recovery against all federal agencies. See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) (the purpose of Section 2679(a) is to "place [the] torts of 'suable' agencies * * * upon precisely the same footing as torts of 'nonsuable' agencies"). That conclusion also follows from an examination of FSLIC's sue-and-be-sued clause itself, which was intended to subject FSLIC to liability like that of any private entity, and which therefore does not waive sovereign immunity for constitutional tort claims to which a private entity could not be subject.

B. Even if FSLIC's sue-and-be-sued clause could be construed to waive sovereign immunity for all claims sounding in tort, respondent's claim would still have to be dismissed because he has not cited to any source of law that mandates the payment of damages against a federal agency for a violation of procedural due process. A right of action for damages against a federal agency simply cannot be recognized in the absence of a clear textual mandate providing for payment of compensation. *United States* v. *Mitchell,* 463 U.S. 206, 218 (1983). No such mandate can be found in the procedural guarantees of the Due Process Clause. *United States* v. *Hopkins,* 427 U.S. 123, 130 (1976).

Nor does *Bivens* provide any basis for implying a damages remedy against a federal agency. In *Bivens* itself, the Court based its conclusion that there were no special factors counselling against recognition of a judicially created remedy in part on the fact that the suit would not result in a money judgment directly against the government. Here, there is no doubt that the suit would permit a judgment directly against a federal entity. Creation of such a right would contravene congressional policy by exposing federal agencies to tort suits for the exercise of discretionary functions and would interfere with the remedial schemes of both the FTCA and the federal banking receivership statutes.

II. The court of appeals also erred in concluding that respondent stated a due process claim by alleging that the federal receiver deprived him of a state-created property interest without a hearing when it discharged him from employment. Respondent had no such property right, and even if he did, procedural due process was satisfied by the availability of postdeprivation remedies that he chose not to pursue.

A. Respondent never had any legitimate expectation that his state-created right to continued employment absent good cause would survive the appointment of a federal receiver. Under federal law, a banking receiver has complete discretion to select employees and to repudiate contracts. The States have no power to limit the authority of a federal banking receiver. Accordingly, even if state law afforded respondent an implied contractual right to continued employment as long as his employer continued its ordinary business operations, state law could not give him a right not to be terminated by a federal receiver. Respondent's contract was qualified, from its inception, by FSLIC's right to terminate his employment at will.

B. Even if respondent had a property interest in continued employment, there was no procedural due process violation here. In light of FSLIC's mandate to act with great speed in taking over a failing financial institution, a predeprivation hearing would have been impracticable. And respondent had available two postdeprivation remedies—submission of a claim to the federal receiver and suit on the violation of his alleged contractual right. In light of the fact that reinstatement was not possible because respondent's employer was closed and its business taken over by a newly chartered institution at the same time that the receiver was appointed, those remedies are more than adequate to provide all the process that was due for respondent's monetary claims.

ARGUMENT

I. *BIVENS* DOES NOT CREATE AN IMPLIED RIGHT OF ACTION AGAINST FEDERAL AGENCIES FOR VIOLATIONS OF PROCEDURAL DUE PROCESS

Even if FSLIC violated the Due Process Clause by terminating respondent's employment without adherence to adequate procedures, the federal courts have no authority to award damages for that violation. As this Court explained in *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983), a claimant against a federal agency may not obtain an award of damages for a violation of law unless two "analytically distinct" conditions are satisfied. First, the claimant must demonstrate that the United States has waived sovereign immunity for the type of damages claim asserted. 463 U.S at 218. Second, even where the United States has consented to suit, "a court must inquire whether the source of substantive law" that allegedly has been violated "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Ibid.* See also *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Neither condition was satisfied in this case.

A. Congress Did Not Waive FSLIC's Sovereign Immunity For Tort Claims Based Upon Violations of The Constitution

The federal government "is immune from suit save as it consents to be sued." *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981) (quoting *United States* v. *Testan*, 424 U.S. at 399); accord *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941). The court of appeals recognized that Congress has not waived the immunity of the United States as to "torts for which state law would not impose liability on private persons, such as constitutional torts." Pet. App. 10a; 28 U.S.C. 1346(b)

(waiving immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). There is accordingly no dispute that the claim asserted in this case could not have been brought directly against the United States.[9]

The court of appeals nevertheless determined that respondent's claim was properly brought against FSLIC. The court concluded that, when Congress provided that FSLIC could sue and be sued, it intended to waive the agency's immunity for constitutional torts.

Initially, the court of appeals erred in interpreting FSLIC's sue-and-be-sued clause. Congress vests federal agencies and instrumentalities with the power to sue and be sued in order to render them "not less amenable to judicial process than a private enterprise under like circumstances would be." *FHA* v. *Burr*, 309 U.S. 242, 245 (1940). See also *Loeffler* v. *Frank*, 486 U.S. 549, 557 (1988) (permitting interest awards against Postal Service under sue-and-be-sued clause "to the extent that interest is recoverable against a private party as a normal incident of suit"). A sue-and-be-sued clause accordingly imposes liability on a federal entity "the same as that of any other business." *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 520 (1984). Since the Constitution generally does not restrict the conduct of private entities, they are not subject to damages liability for constitutional violations. Accordingly, Congress did not intend sue-and-be-sued clauses to subject federal entities to damages liability for violations of the Constitution.

[9] Other courts have uniformly dismissed constitutional tort claims brought against the United States based upon the limited waiver of the FTCA. See, *e.g.*, *McCollum* v. *Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); *Boda* v. *United States*, 698 F.2d 1174, 1176 (11th Cir. 1983); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); cf. *Carlson* v. *Green*, 446 U.S. 14, 23 (1980).

Even if FSLIC's sue-and-be-sued clause, taken in isolation, could be read to waive sovereign immunity to constitutional torts, however, the FTCA makes clear that such a reading would be improper.

1. The FTCA contains an express limitation on the scope of FSLIC's sue-and-be-sued clause that requires dismissal of respondent's claim. Section 2679(a) of the FTCA provides that

> [t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a). Section 1346(b), to which Section 2679(a) refers, is the "principal provision" of the FTCA. *Smith* v. *United States*, 113 S. Ct. 1178, 1181 (1993). It provides the basic waiver of sovereign immunity, subject to the conditions set forth in the statute.

The court of appeals acknowledged that Section 2679(a) generally renders the FTCA an exclusive remedy, even as to claims for which the FTCA does not permit recovery. Pet. App. 9a. But the court held that Section 2679(a) had that effect only for certain categories of tort claims. According to the court of appeals, tort claims that are "explicitly" excluded from the FTCA, such as the "[c]laims labeled 'exceptions' by 28 U.S.C. § 2680" are "cognizable" within the meaning of Section 2679(a) and hence must be brought under the FTCA, if at all. Pet. App. 8a-9a. The court held that tort claims like respondent's are "implicitly" excluded from the FTCA, because they are excluded by Section 1346(b), the basic waiver of sovereign immunity. According to the court, such claims are not "cognizable" within the meaning of Section 2679(a) and may be brought against

sue-and-be-sued agencies without regard to the substantive and procedural requirements of the FTCA. Pet. App. 8a, 10a-11a.[10]

The court's interpretation of the FTCA is not supported by the language Congress used, and it would eviscerate the uniform, exclusive scheme of tort remedies mandated by Section 2679(a). Respondent's claim is barred because all claims sounding in tort are "cognizable" under the FTCA, the constitutional claim respondent asserted sounds in tort, and respondent's claim thus may be brought only if it is permitted by the FTCA.

2. The court of appeals' holding that "expressly" excluded torts are "cognizable" under the FTCA while "implicitly" excluded torts are not is inconsistent with Congress's own use of the term "cognizable" elsewhere in the FTCA.

In terms identical to those used in Section 2679(a), 28 U.S.C. 2677 provides that "[t]he Attorney General * * * may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title." That language gives the Attorney General the power to settle any tort claim against the United States, even if there is a strong argument that there could be no FTCA recovery because the claim is, in the court of appeals' terms, "implicitly" excluded.

In *Hubsch* v. *United States*, 174 F.2d 7 (5th Cir. 1949), both the district court and the court of appeals held that a tort claim was barred under the FTCA because the employee who committed the tort had not been acting within the scope of his employment. Because the "scope of employment" requirement is found in Section 1346(b), the case would presumably be found to be "implicitly" excluded from the FTCA—and thus not "cognizable" under Section 1346(b) or Section 2677—under

[10] The court did not explain whether claims that are excluded on other grounds—for instance, because the claimant failed to submit a timely administrative claim, see 28 U.S.C. 2675(a)—would fall into the "explicit" or "implicit" category.

the rule applied by the Ninth Circuit in this case. Nonetheless, this Court held, in a *per curiam* opinion, that Section 2677 provided authority for the Attorney General to settle the claim. *Hubsch* v. *United States*, 338 U.S. 440 (1949). That holding establishes that, even though recovery on the claim was almost certainly precluded by Section 1346(b), the claim was still "cognizable" under that provision.

The same conclusion follows from actions Congress took in revising the FTCA's statute of limitations provision in 1948. That provision originally governed "[e]very claim against the United States cognizable under this title." 28 U.S.C. 942 (1946). In the course of a comprehensive revision of the Judicial Code, the provision was changed to apply—as it does today—to any "tort claim against the United States." 28 U.S.C. 2401(b). The reviser stated that the modification was intended to "simplif[y] and restate[]" the limitations provision "without change of substance." 28 U.S.C. 2401(b), Revision Note.[11] Congress accepted that explanation and the revised version of the statute, thus indicating that it viewed all tort claims as "cognizable" under the FTCA, regardless of whether they may be excluded by one or another requirement of the statute.

3. This Court's decision in *United States* v. *Smith*, 111 S. Ct. 1180 (1991), provides further support for the conclusion that all claims sounding in tort are "cognizable" under the FTCA without regard to whether the Act permits recovery on the claim. In *Smith*, the Court held that even though the FTCA itself did not permit recovery on the plaintiff's claim, an FTCA exclusive remedy provision barred him from pursuing an alternative rem-

[11] Indeed, absent an express statement by the Revisers to the contrary, this Court has presumed that modifications made in the 1948 revision of the Judicial Code did not change prior law. *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 831 n.4 (1989); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227-228 (1957).

edy.[12] The numerous courts that have considered the issue under Section 2679(a), the provision at issue in this case, have all reached the same conclusion.[13]

The logic of *Smith* applies regardless of whether a tort claim is made noncompensable through the "implicit" exclusions of Section 1346(b) or through the "explicit" exclusions of Section 2680. The FTCA is a conditional waiver of the federal government's sovereign immunity. It incorporates numerous limitations on that waiver, set forth in a variety of different sections. See, *e.g.*, 28 U.S.C. 2680(a) (discretionary function exception); 28 U.S.C. 2675(a) (timely filing of an administrative claim); 28 U.S.C. 1346(b) (claim must be based on the liability of a private person under local law). There is no evidence that Congress attributed any significance to

---

[12] *Smith* involved 28 U.S.C. 2679(b)(1), which provides that an FTCA action is "exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." In *Smith*, the plaintiff's malpractice claim under the FTCA was barred by 28 U.S.C. 2680(k), because it arose outside the United States. This Court held that Section 2679(b) "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability," and therefore barred a separate suit against the employee. 111 S. Ct. at 1185.

[13] See, *e.g.*, *Taylor* v. *Administrator of SBA*, 722 F.2d 105 (5th Cir. 1983); *Northridge Bank* v. *Community Eye Care Center, Inc.*, 655 F.2d 832, 834-835 (7th Cir. 1981); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 370-371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland Employees Fed. Credit Union* v. *FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974); *Edelman* v. *Federal Housing Admin.*, 382 F.2d 594 (2d Cir. 1967); *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-346 & n.3 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *Freeling* v. *FDIC*, 221 F. Supp. 955, 956 (W.D. Okla. 1962), aff'd, 326 F.2d 971 (10th Cir. 1963) (per curiam).

the statutory placement of those conditions for purposes of determining the types of claims that are "cognizable" under the FTCA. See S. Rep. No. 1400, 79th Cong., 2d Sess. 29 (1946) ("This title waives, with certain limitations governmental immunity to suit *in tort* and permits suit on *tort claims* to be brought against the United States.") (emphasis added).

4. The end result of the court of appeals' interpretation of Section 2679(a) is to subject sue-and-be-sued agencies to tort suits that cannot be brought against other federal agencies. Yet that is exactly what Section 2679(a) was enacted to prohibit.

Prior to the enactment of the FTCA, tort claims against federal agencies were compensable only through the enactment of private bills. See generally Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 Law & Contemp. Prob. 311 (1942). When Congress enacted the FTCA in 1946, ch. 753, §§ 401 *et seq.*, 60 Stat. 842, it intended to displace that cumbersome legislative process with a uniform framework for judicial resolution of tort claims against the government.

By 1946, however, more than 40 federal instrumentalities had been created with sue-and-be-sued clauses in their organic statutes. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 390 (1939). Those clauses generally had been held to constitute consent to suit for tort claims. See, *e.g.*, *id.* at 395-396; *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567-568 (1922). Accordingly, Congress confronted the prospect that the sue-and-be-sued clauses of some agencies would provide a back-door waiver of immunity from tort claims that would threaten the integrity of the carefully crafted administrative procedures and substantive limitations built into the FTCA. Its solution was Section 2679(a).

The language of Section 2679(a) leaves no doubt that tort claims against sue-and-be-sued agencies must be subject to the same uniform administrative machinery and

substantive limitations as are suits against any other agency. As the House Committee Report explained, "[t]his will place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). For both types of agencies, "the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act." *Ibid.* Congress "intended that neither corporate status nor 'sue-and-be-sued' clauses shall, alone, be the basis for suits for money recovery sounding in tort." *Ibid.*[14] *See* generally *Loeffler* v. *Frank*, 486 U.S. 549, 561-562 (1988).

The court of appeals' holding that "implicitly" excluded claims are not cognizable under the FTCA entirely defeats Congress's expressed intent in enacting Section 2679(a) to "place torts of 'suable' agencies * * * upon precisely the same footing as torts of 'nonsuable' agencies." Because a plaintiff could sue a sue-and-be-sued agency—but not the United States itself or any other federal agency—on an "implicitly" excluded claim, the effect would be directly contrary to Congress's intent;

[14] The FTCA was ultimately enacted as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812. The Senate Report on the bill contained exactly the same language explaining the exclusive remedy provision as did the House Report. See S. Rep. No. 1400, 79th Cong., 2d Sess. 33-34 (1946). An earlier report on a predecessor bill made a similar point. See S. Rep. No. 1196, 77th Cong., 2d Sess. 8 (1942), which explained that "there is no sound reason for distinguishing between employees of an executive department or independent establishment and those of a governmental corporation." See also *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on Judiciary*, 77th Cong., 2d Sess. 34 (1942) (testimony of Ass't Att'y Gen. Francis M. Shea) (the provision "terminate[s] the liability of Federal corporations which now are subject to be sued in their own name, in respect of tort claims generally cognizable under the act").

it would make the sue-and-be-sued clause "the basis for suits for money recovery sounding in tort."

Nor would the effect of the court of appeals' holding be limited to constitutional torts. As noted above, Section 1346(b) excludes several distinct types of tort claims, in addition to those for which a "private person * * * would [not] be liable to the claimant in accordance with the law of the place where the act or omission occurred." Strict liability claims, *i.e.*, those claims not caused by the "negligent or wrongful act or omission" of a federal employee—are excluded by Section 1346(b). See *Dalehite* v. *United States*, 346 U.S. 15, 44-45 (1953); *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). So are claims caused by a federal employee not "acting within the scope of his office or employment." See *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956). Since all of those claims are excluded by Section 1346(b), the court of appeals would be likely to classify all as "implicitly" excluded claims and permit suit on any of them to be brought directly against sue-and-be-sued agencies.

Even the requirement that federal agencies be held liable only if private persons would be liable under state law would result in permitting garden-variety tort claims to be brought against sue-and-be-sued agencies free of the requirements of the FTCA. Numerous cases have found the private person/state law requirement was not satisfied because, for example, state law exempted private persons from liability[15] or the law of a State other than that in which the act occurred would have imposed liability.[16] Under the court of appeals' reasoning, all of those

[15] See, *e.g.*, *Proud* v. *United States*, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988); *Ewell* v. *United States*, 776 F.2d 246, 249-249 (10th Cir. 1985).

[16] See, *e.g.*, *Myrick* v. *United States*, 723 F.2d 1158 (4th Cir. 1983); *Brock* v. *United States*, 601 F.2d 976, 977 & n.2 (9th Cir. 1979).

cases could be brought against sue-and-be-sued agencies because they are only "implicitly" excluded from the FTCA. None of them, however, could be brought against the United States or nonsuable government agencies.

5. If the court of appeals had interpreted Section 2679(a) correctly, it could not have construed FSLIC's sue-and-be-sued clause to waive FSLIC's sovereign immunity from respondent's claim. That claim sounds in tort.

a. Although respondent's claim is grounded on the Constitution and framed in due process terms, even the court of appeals recognized that it "sound[s] in tort." Pet. App. 10a. Quoting a recent treatise, this Court has recently defined "tort" as a "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." *United States* v. *Burke*, 112 S. Ct. 1867, 1870-1871 (1992) (citation omitted). Although a number of other definitions of "tort" have been offered, all of them share two features: the violation of a non-consensual duty or obligation and a request for damages.[17] Respondent's claim falls squarely within that definition.[18]

[17] The Fourth Circuit has recently stated that "[a] cause of action for breach of a duty imposed by statute or case law, and not by contract, is a tort action." *J.C. Driskill, Inc.* v. *Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990). Accord *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 369 (7th Cir.), cert. denied, 444 U.S. 829 (1979). Among the definitions in *Black's Law Dictionary* 1489 (6th ed. 1990) are "[a] violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction" and "[a] legal wrong committed upon the person or property independent of contract." See also W. Prosser, *The Law of Torts* 2 (4th ed. 1971); 1 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 1:1 (1983).

[18] In a footnote, the court of appeals questioned "whether all 'constitutional torts' are properly understood as torts," and noted that, under California law, contractual remedies are the sole source of relief for breaches of the implied covenant of good faith and

That conclusion is further supported by decisions involving *Bivens* actions against federal officers and actions brought against state officers pursuant to 42 U.S.C. 1983, which serves a function analogous to *Bivens* in the state context. For example, this Court has frequently recognized that 42 U.S.C. 1983 "creates a species of tort liability." *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 305 (1986) (internal quotation marks omitted); see *Smith* v. *Wade*, 461 U.S. 30, 34 (1983); *Carey* v. *Piphus*, 435 U.S. 247, 253 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). In addition, this Court has turned to state statutes of limitations applicable to torts—not to contracts—to provide appropriate limiations periods for constitutional claims brought under Section 1983, see *Wilson* v. *Garcia*, 471 U.S. 261, 276-277 (1985), and lower courts have applied the same reasoning to *Bivens* actions, see *e.g.*, *Van Strum* v. *Lawn*, 940 F.2d 406, 409-410 (9th Cir. 1991); *Chin* v. *Bowen*, 833 F.2d 21, 22-23 (2d Cir. 1987). Similarly, in identifying immunities available to defendants in Section 1983 actions based, like *Bivens* actions, on violations of the Constitution, this Court has relied on the analogy between constitutional violations and common law torts. See, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (referring to "the tort liability created by § 1983"); *Pier-*

fair dealing. Pet. App. 20a-21a n.17. Respondent's claim, however, is not that FSLIC entered into an agreement to provide him with a hearing before discharging him and then violated that agreement. Rather, it is that FSLIC deprived him of a property interest without due process of law. Indeed, before trial respondent's counsel highlighted the "important * * * distinction" between respondent's due process claims and a suit for breach of contract. As counsel explained: "this is not a situation where the employer has terminated an employee. Rather, it's a situation where the federal government has taken from a citizen a property right, namely, the right to continued employment absent just cause for dismissal. And that will affect the damages and will affect the case in a lot of ways." 1 Tr. 6-7.

son v. *Ray,* 386 U.S. 547, 553-557 (1967). And the Court has often described Constitution-based claims brought under *Bivens* and Section 1983 as "constitutional torts." [19]

b. Recent legislation also makes clear that claims based upon alleged constitutional violations sound in tort and are "cognizable"—but not compensable—under the FTCA. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act), Pub. L. No. 100-694, §§ 5, 6, 102 Stat. 4564-4565, added a new 28 U.S.C. 2679(b) to the statute to parallel the exclusive remedy provision at issue in this case, 28 U.S.C. 2679(a). The new section provides that the "[t]he remedy against the United States provided by section[] 1346(b) * * * is exclusive of any other civil action or proceeding" against federal employees acting within the scope of their employment. 28 U.S.C. 2679(b)(1). But the new section also expressly provides that it "does not extend or apply to a civil action * * * which is brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2)(A).

The new statute is based on the premise that—contrary to the court of appeals' holding in this case—Section 1346(b) provides a "remedy against the United States" for constitutional torts, even though no recovery is permitted. For if Congress believed that Section 1346(b) did not provide a "remedy against the United States" for constitutional torts, the new exclusive remedy provision would have had no application to such torts in any event, and Section 2679(b)(2) would have been entirely superfluous. The court of appeals appears to have acknowledged that reasoning, but concluded that Section 2679

---

[19] See, *e.g., Collins* v. *City of Harker Heights,* 112 S. Ct. 1061, 1066-1068 (1992); *Siegert* v. *Gilley,* 111 S. Ct. 1789, 1792 (1991); *Memphis Community School District* v. *Stachura,* 477 U.S. at 307; *Smith* v. *Wade,* 461 U.S. 30, 75 (1983) (Rehnquist, J., dissenting); *Polk County* v. *Dodson,* 454 U.S. 312, 326 (1981); *Monell* v. *Department of Social Services,* 436 U.S. 658, 663-664 n.7 (1978).

(b)(2) was simply a "reminder" or an "added guarantee." Pet. App. 19a. That conclusion ignores the rule that Congress is presumed not to have enacted superfluous provisions. See, *e.g., Mackey* v. *Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 837 (1988); *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979); *Jarecki* v. *G.D. Searle & Co.,* 367 U.S. 303, 307-308 (1961); *United States* v. *Menasche,* 348 U.S. 528, 538-539 (1955).

B. The Court Should Not Imply a Damages Remedy Against Federal Agencies For Denials of Procedural Due Process

Even if Congress waived FSLIC's immunity from all claims for damages, respondent still must demonstrate that the "substantive law" he relies upon—here the procedural guarantees of the Due Process Clause—"can be, interpreted as *requiring* compensation." *Mitchell,* 463 U.S. at 218 (emphasis added). Unlike the Just Compensation Clause of the Fifth Amendment, the Due Process Clause makes no reference to compensatory redress. The court of appeals therefore erred in holding that this Court's decision in *Bivens* authorized it to read the Due Process Clause as creating an implied right of action for damages against federal agencies.

1. A simliar construction of the rights conferred by the Due Process Clause was rejected in *United States* v. *Hopkins,* 427 U.S. 123 (1976) (per curiam). In *Hopkins,* a former federal employee asserted a claim under the Tucker Act, 28 U.S.C. 1491, for wrongful discharge. The Tucker Act includes a broad waiver of sovereign immunity for certain types of claims founded upon violations of "the Constitution" and other laws. 28 U.S.C. 1491. The claimant in *Hopkins* contended that her discharge claim was based upon "the Constitution" within the meaning of the Tucker Act because it violated due process. The Court observed that its decision in *United States* v. *Testan,* 424 U.S. 392, 402 (1976)—which em-

phasized that a waiver of sovereign immunity authorizes the award of money only if the substantive law allegedly violated "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"—"foreclosed" a monetary claim for a violation of procedural due process rights. 427 U.S. at 130.

Hopkins indicates that the waiver of sovereign immunity under the Tucker Act for constitutional violations does not supply a right of action for damages under the Due Process Clause because that Clause cannot be read as "mandating" (*Testan,* 424 U.S. at 402) compensation. See also *Inupiat Community of the Arctic Slope* v. *United States,* 680 F.2d 122, 132 (Ct. Cl.), cert. denied, 459 U.S. 969 (1982); *Mack* v. *United States,* 635 F.2d 828, 832 (Ct. Cl. 1980), cert. denied, 451 U.S. 913 (1981); *Montoya* v. *United States,* 22 Cl. Ct. 568, 570 (1991). Similarly, even if FSLIC's sue-and-be-sued clause could be read to waive immunity for constitutional torts, it does not supply a right of action for damages, and neither does the Due Process Clause.

Although *Bivens* held that federal courts have the authority to impose damages on individual officials, 403 U.S. at 396-397, nothing in that decision, or in this Court's subsequent cases, suggests that the Due Process Clause can be read as "mandating" compensation against the federal government. The recognition of a right of action for damages against a federal agency under the Due Process Clause accordingly does not conform to the requirements established in *Hopkins,* 427 U.S. at 130, and *Testan,* 424 U.S. at 402. See also *OPM* v. *Richmond,* 496 U.S. 414, 432 (1990) (judicial recognition of equitable estoppel barred by the Appropriations Clause because "[f]unds may be paid out only on the basis of" some "express terms" that establish a "substantive right to compensation").

2. Even if the Due Process Clause were read to grant federal courts discretion to imply a right of action for damages against a federal agency, this Court's decisions would not support the exercise of that authority here. In *Bivens,* this Court held that an individual who can demonstrate an injury as the consequence of a violation of his Fourth Amendment rights by a federal employee may bring a suit for money damages against that employee. By implying a private right of action directly from the Constitution in favor of an injured plaintiff, the Court permitted the action to be brought against the federal employee whose constitutional violation caused the injury, but not against the government itself. As the Court noted, there were no "special factors counselling hesitation" in implying a cause of action against the individual employee. 403 U.S. at 396. Several factors do counsel hesitation in the very different context presented here.

a. Unlike the remedy recognized in *Bivens,* the right of action created by the court of appeals in this case involves "a question of 'federal fiscal policy.'" 403 U.S. at 396. See also *United States* v. *Standard Oil Co.,* 332 U.S. 301, 314 (1947) ("Congress, not this Court or the other federal courts, is the custodian of the national purse" and "the primary and most often the exclusive arbiter of federal fiscal affairs").

Respondent has argued that the fiscal impact of this action would be no greater than the impact of a *Bivens* action against a federal employee in circumstances under which that employee could obtain indemnification from the federal government. Br. in Opp. 12. The fact that individual federal employees may be indemnified for *Bivens* awards against them, however, has no bearing on the question whether a *Bivens* action can be implied directly against a federal agency. The legal difficulty with *Bivens* actions directly against the federal government is not just that judgments against the government in such actions cost money, although that is a concern. Rather, it is that Congress, which is the only entity to which the Constitution grants authority to appropriate federal funds,

see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), has never created a general cause of action for constitutional violations by federal agencies or authorized the expenditure of federal funds to satisfy judgments in a court-authorized action of that sort.[20] It is that fact—and not solely the fiscal impact of *Bivens* actions on the federal treasury—that renders implication of a *Bivens* action against a federal agency "plainly inconsistent with Congress' authority in this field." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983).

The necessity for respecting Congress' exclusive authority over federal appropriations is illustrated by government indemnification programs. Unlike a judgment against a federal agency, federal payment of a damages award against a federal employee, although in many cases authorized, is always subject to certain requirements or conditions. See, *e.g.*, 28 C.F.R. 50.15(c) (authorizing Department of Justice to indemnify its employees only after determining that "such indemnification is in the interest of the United States"). In limiting the availability of indemnification, Congress or Executive Branch officials with delegated authority are exercising a constitutional prerogative. To imply a *Bivens* action with no such limitations—or with such limitations as this Court or the lower federal courts believed appropriate—would be to transfer that constitutional prerogative from the legislature, where it rests under Article I, § 9, Cl. 7 of the Constitution, to the judiciary.

b. A second factor counsels hesitation in the context of this case. Congress enacted the discretionary function exception to the FTCA to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); see also *United States* v. *Gaubert*, 111 S. Ct. 1267, 1273 (1991). Indeed, because judicial review in tort suits of administrative (or legislative) policy choices would raise core separation of powers concerns, this Court has noted Congress's belief that "claims of the kind embraced by the * * * exception would have been exempted from the waiver of sovereign immunity by judicial construction" even if Congress had not included the exception in the FTCA. *Varig Airlines*, 467 U.S. at 810.

FSLIC's action in dismissing respondent is plainly the type of discretionary function that Congress sought to protect from judicial review in tort suits. Upon the failure of a bank or thrift, federal regulators and receivers seek to maintain the public's confidence in the savings and loan industry and to preserve the failed institution's assets for the benefit of accountholders. *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987). As in *United States* v. *Gaubert*, decisions made by a federal receiver after the takeover of a failed thrift—including decisions about which employees to terminate and which contracts to repudiate—are based on "policy reasons of primary concern to the [federal officials]" and thus would fall within the discretionary function exception if challenged under the FTCA. 111 S. Ct. at 1278.[21] The court of appeals' decision to imply a *Bivens* remedy here impermissibly expands judicial re-

[20] The judgment fund created by 31 U.S.C. 1304 does not provide such authorization, since that fund does not create the "substantive right to compensation," *OPM* v. *Richmond*, 496 U.S. at 432, that respondent seeks in this lawsuit. See also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 563 (1992).

[21] It is instructive to note that one of the acts complained of in the *Gaubert* litigation was a decision by federal regulators to require that the thrift's board of directors be replaced with federally approved personnel. The court of appeals in *Gaubert* found that decision to fall within the discretionary function exception, a ruling that Gaubert did not challenge. 111 S. Ct. at 1276. Similarly, the district court in this case found that respondent's action against the United States was barred by the discretionary function exception. See p. 5, *supra*.

view of administrative and legislative policy choices in the face of Congress's express prohibition of such review. See *United States* v. *Stanley*, 483 U.S. 669 (1987).

c. This Court has also found that the existence of an elaborate remedial mechanism fashioned by Congress is a special factor counseling against implication of a *Bivens* remedy, even if that scheme would not provide a complete remedy for the prospective *Bivens* plaintiff. That factor applies here as well.

In *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), the Court recognized that federal employees had "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." Despite the fact that the plaintiff federal employee's Civil Service remedies "did not fully compensate him for the harm he suffered," the Court held that no *Bivens* remedy should be implied for his claim that he had been demoted for exercising his First Amendment rights. Similarly, in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), this Court followed *Bush* in refusing to imply a *Bivens* remedy for an individual who claimed his social security disability benefits were improperly terminated, despite the fact that the existing remedial scheme would not provide him with complete relief. *Id.* at 424-429.

Similarly, respondent's claim arises at the intersection of several different remedial schemes. Initially, as we explained above, see pp. 13-23, *supra*, Congress has addressed the issue of tort claims against the government, and has embodied in the FTCA its own judgments about the circumstances under which such claims should be permitted. In addition, as we explain below, see pp. 40-44, *infra*, respondent could have brought his claim as a creditor of the receivership estate either through an administrative claims process, with subsequent adjudication in federal court, or directly in federal court. The existence of both the FTCA scheme and the receivership remedy strongly counsels against further modification of the sys-

tem of rights and remedies through implication of a *Bivens* action for respondent and other creditors of a banking receivership estate.

II. RESPONDENT'S DISMISSAL WITHOUT A HEARING DID NOT VIOLATE THE DUE PROCESS CLAUSE

Regardless of FSLIC's amenability to a constitutional damages suit, FSLIC did not violate the Due Process Clause when it dismissed respondent without a hearing. Respondent did not have a protected property interest in continued employment with Fidelity once Fidelity had been placed in federal receivership, and even if such an interest had existed, the opportunity for respondent to file a claim against FSLIC as receiver satisfied the Due Process Clause.

A. Respondent Had No Protected Property Interest In Continued Employment With Fidelity After It Was Taken Over By FSLIC

"Property interests, of course, are not created by the Constitution"; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). In this case, there was neither a "rule" nor an "understanding" that could provide respondent with an expectation of continued employment absent good cause for dismissal once a federal receiver had taken over Fidelity. Therefore, the receiver's dismissal of respondent did not deprive respondent of any property interest, and he has failed to state a claim under the Due Process Clause.

1. The court of appeals held that, under California common law, respondent had obtained a right to continued employment absent good cause, in light of "a history of satisfactory employment" and "an understanding

of fair dealing." Pet. App. 26a; see also Pet. App. 22a-23a. The court stated that California courts have treated the violation of that right as a breach of contract, to be remedied by contract damages. Pet. App. 20a-21a n.17, 22a-23a n.18 (both quoting *Foley* v. *Interactive Data Corp.*, 765 P.2d 373, 401-402 (Cal. 1988)).

Although California law may have given respondent an enforceable contractual right to continued employment, federal law does not recognize a right to continued employment with a thrift placed in receivership. As noted above, at the time Fidelity failed, FSLIC as receiver was empowered by statute to (1) take over and operate the thrift, (2) liquidate it, (3) merge it with another institution, (4) "take such action as may be necessary to put it in a sound solvent condition," or (5) "make such other disposition of the matter as it deem[ed] appropriate." 12 U.S.C. 1729(b)(1)(A) (1988). Accordingly, the agency's regulations made clear that as receiver, it was to "do all things desirable or expedient at its discretion to carry on the business of [the failed] institution and to preserve and conserve the assets and property of every nature of such institution," including "[e]mploy[ing] on a salary or fee basis such personnel as in [its] judgment * * * is necessary or desirable to carry out its responsibilities and functions." 12 C.F.R. 569a.6(a)(1) and (4) (1982).[22] In addition, the regulations made clear that FSLIC could exercise the "power to * * * [r]eject or repudiate any lease or contract which it considers burdensome." 12 C.F.R. 569a.6(c)(3) (1982).[23] The "broad statutory

[22] The regulations were promulgated by the Federal Home Loan Bank Board pursuant to 12 U.S.C. 1464(d)(6)(C) (1988). See *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 571 (1989).

[23] Although prior to FIRREA, no parallel regulation expressly gave FDIC the power to repudiate executory contracts, courts recognized that as receiver it necessarily had that authority. See, *e.g.*, *FDIC* v. *Grella*, 553 F.2d 258, 262-263 (2d Cir. 1977); *Argonaut*

mandate," *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 580 (1989); see *id.* at 568-572, granted federal receivers thus necessarily included a right to terminate bank management at will—a right that FSLIC and FDIC have regularly exercised in the public interest.[24] See *Gaubert*, 111 S. Ct. at 1279. And Congress underscored FSLIC's discretion in exercising its powers as receiver by generally prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of a

Sav. & Loan Ass'n v. *FDIC*, 392 F.2d 195, 197 (9th Cir.), cert. denied, 393 U.S. 839 (1968). When it enacted FIRREA, Congress codified and enlarged the authority of FDIC and RTC to repudiate contracts. See 12 U.S.C. 1821(e)(1) (Supp. III 1991) (FDIC); 12 U.S.C. 1441a(b)(4)(A) (Supp. III 1991) (RTC). Those provisions of FIRREA "incorporate[] rights and principles established at common law or in bankruptcy." S. Rep. No. 19, 101st Cong., 1st Sess. 314 (1989). FIRREA also "follows common law principles in limiting to compensatory relief the damages that a party may claim on a repudiated contract." *Ibid.*

[24] FSLIC's authority to repudiate executory contracts, including employment contracts, mirrored the similar power that receivers have under the common law. In general, a receiver is "not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if, in his opinion, it would be unprofitable or undesirable to do so." *United States Trust Co.* v. *Wabash Western Ry.*, 150 U.S. 287, 288-289 (1893). That principle has long been applied to employment contracts. See, *e.g.*, *Erie Malleable Co.* v. *Standard Parts Co.*, 299 F. 82, 85-86 (6th Cir. 1924); *Greenblatt* v. *Ottley*, 430 N.Y.S.2d 958, 963 (Sup. Ct. 1980); *Riker* v. *Browne*, 204 N.Y.S.2d 60, 62 (Sup. Ct. 1960); *Rosenbaum* v. *United States Credit-System Co.*, 40 A. 591, 593 (N.J. 1898); *Birmingham Trust & Sav. Co.* v. *Atlanta B. & A. Ry.*, 271 F. 731, 738 (N.D. Ga. 1921). Some courts have held that upon appointment of a receiver, employment contracts terminate as a matter of law. See *Wade* v. *Mutual Bldg. & Loan Ass'n*, 145 S.E. 18, 19 (N.C. 1928); *People* v. *Globe Mut. Life Ins. Co.*, 91 N.Y. 174, 179-180 (1883); *Ely* v. *Van Kannel Revolving Door Co.*, 184 F. 459, 462 (C.C.E.D.N.Y. 1911); *Lenoir* v. *Linville Improvement Co.*, 36 S.E. 185, 188 (N.C. 1900). In a somewhat analogous situation, the Bankruptcy Code gives a bankruptcy trustee authority to repudiate the debtor's contracts. See 11 U.S.C. 365(a), 1113.

conservator or receiver." 12 U.S.C. 1464(d)(6)(C) (1988).

In light of FSLIC's broad powers under federal law, California law could not vest respondent with a right to continued employment by FSLIC as receiver.[25] The purpose of the California common-law right to continued employment is to limit the ability of an employer simply to dismiss employees at will. That purpose is entirely at odds with the purposes underlying the grant to FSLIC as receiver of the unreviewable authority to employ personnel as it deems appropriate and to repudiate executory contracts in its sole discretion. To recognize a state-law-based right to continued employment in those circumstances would frustrate specific objectives of the federal banking receivership scheme, see *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); indeed, the very essence of receivership is new management. Under standard preemption principles, the state-law right to continued employment had to give way to the powers of the federal receiver. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 152-154 (1982). Respondent had no legitimate expectation of continued employment—and no property interest in such employment —should Fidelity go into federal receivership.[26]

---

[25] Indeed, federal regulations applicable at the time of respondent's dismissal made clear that thrifts could not enter into contracts for indefinite terms of employment. They provided that a federally insured thrift was forbidden from entering into employment contracts that "could materially interfere" with the board of directors' discretion regarding the employment of officers, such as by including "an excessive term" or failing to include "an appropriate termination for cause provision." 12 C.F.R. 563.39 (1982).

[26] Because respondent had no property right, it is not clear what issue would be presented to the decisionmaker at a hearing in this case. In procedural due process cases, the issue to be litigated at the hearing sought by the plaintiff is ordinarily whether some limitation on the property right created by state law has been met.

2. The court of appeals acknowledged the argument that respondent's purported entitlement to continued employment was "limited by the prospect of Fidelity's placement in receivership" and found that argument "appealing." Pet. App. 26a. But the court rejected it on the ground that "[t]he fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." Pet. App. 26a.

The court's reasoning is flawed, for our argument is not that respondent's right was "retrospectively" annulled, but rather that from the beginning he had no legitimate expectation to continued employment by a federal receiver. The difference can be illustrated by transposing this case

---

See, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230, 245 (1988) (whether statutory condition on removal of indicted bank officer had been satisfied); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 535, 544 n.9 (1985) (whether employee had been terminated for cause under state law); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9-12 (1978) (whether termination of utility service was "for cause" under state law); *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976) (compliance with federal standard for social security disability benefits).

Respondent's complaint alleges that had he been given a hearing, "he would have demonstrated * * * why he should not have been terminated from his employment." J.A. 28. That appears to embody the theory that the state law "good cause" standard would be applicable to the receiver's decision to discharge him. Under standard preemption principles, however, a federal receiver is simply not bound to act in accord with state law principles that conflict with his federal grant of power. Nor would the issue in a hearing be whether the receiver had complied with federal law. It is undisputed that federal law gave respondent no right to continued employment, and respondent had no cause of action against the federal receiver for alleged failures to exercise his discretion properly in making employment decisions. Respondent's real complaint appears to be a substantive complaint about the preemption of state law by federal law in this context, not a procedural one about the need to have a hearing prior to his discharge. Cf. *Atkins* v. *Parker*, 472 U.S. 115, 128-131 (1985).

to a purely state-law context. Suppose, for example, that California common law generally recognized both a right to continued employment absent good cause and the right of receivers not to be bound by pre-existing executory contracts.[27] If a case like this, not involving federal banking authorities, arose in California courts in a purely state context, it would perhaps be difficult to predict how those courts would decide the case—*i.e.*, whether those courts would find that the state-created right to continued employment did or did not oust the state-created right of a receiver to repudiate executory contracts. In either event, however, no due process issue would be raised; there could be no argument that, if the right to continued employment did not survive receivership, the State had somehow deprived respondent of a property interest that state law had previously granted him. The sole question in that case would be the substantive state-law question of whether the state-law right to continued employment extended to a receivership situation.

The same analysis applies here. California law could not supersede federal law, which makes a bank employee's contract rights subject to certain conditions. One such condition is the right of the federal banking receiver to employ such personnel as it deems appropriate or to repudiate executory contracts. Thus, respondent's substantive property rights never included a right to continue in the employment of a bank in receivership. A legal limitation on contract rights—whether imposed by state or federal law—is simply not a deprivation of property. See *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982) (State does not deprive persons of property when it limits the

[27] California law appears to recognize both rights. Compare Pet. App. 22a & n.18 (citing California cases concerning right to continued employment) with *Irving Trust Co.* v. *Densmore*, 66 F.2d 21, 23 (9th Cir. 1933) (recognizing right of receiver to repudiate contracts under California law); *H.D. Roosen Co.* v. *Pacific Radio Publishing Co.*, 11 P.2d 873, 876 (Cal. Ct. App. 1932) (same).

scope of those rights by providing that they are extinguished upon the occurrence of certain events); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.")

3. That conclusion is supported by this Court's decisions in related areas. Aside from respondent's state-created right to continued employment absent good cause, numerous other contractual rights were altered or invalidated when FSLIC was appointed receiver for Fidelity. For example, under the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456 (1942), a party may not assert an agreement not reflected in a bank's official records as a defense to an FDIC suit for payment on a note. Even if such an unrecorded side agreement were fully supported by consideration and would give the party asserting it valuable rights under state law, it could not be asserted against the FDIC.

Respondent's position is exactly parallel to that of a party asserting an unwritten side agreement in a case governed by *D'Oench*. As in a *D'Oench* case, respondent claims that under state law he held a valuable contract right, and that the appointment of a federal receiver invalidated that right. Yet this Court has never viewed *D'Oench* or the related statutory provisions in 12 U.S.C. 1823(e), see *Langley* v. *FDIC*, 484 U.S. 86 (1987), as constitutionally suspect under the Due Process Clause, and the lower courts have consistently rejected constitutional challenges to the *D'Oench* doctrine. See, *e.g.*, *FSLIC* v. *Griffin*, 935 F.2d 691, 698 (5th Cir. 1991); *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). The reason, as in this case, is that the claimant in *D'Oench* never obtained a contract right to enforce an unrecorded side agreement against a federal

receiver who comes into possession of his note. See *Campbell*, 901 F.2d at 1248. As in this case, the application of the *D'Oench* doctrine does not result in the deprivation of any state-created property right.

4. The court of appeals relied on *FDIC* v. *Mallen*, 486 U.S. 230 (1988), to support its conclusion that Meyer had a property interest in continued employment. *Mallen*, however, does not cast any doubt on the conclusion that employees of financial institutions in federal receivership do not have the same property rights that may have attached prior to the receivership. In *Mallen*, a bank officer was suspended pursuant to a federal statute requiring suspension of bank officers indicted for felonies involving dishonesty or breach of trust. 486 U.S. at 233. Suspension was not automatic, however. The agency was required to make findings concerning the threat posed to the interests of the depositors in order to support imposition of that sanction. *Id.* at 234-235.

The scope of the bank employee's property rights were not at issue in *Mallen*. The Court agreed with the parties that the officer's "interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause." *Id.* at 240. The question was not whether the employer had a right to continue in his employment when the statutory cause for suspension had occurred, but only the type of procedures that were required to determine the facts.

In contrast, FSLIC did have the authority to remove respondent without a determination of cause, in accordance with its policy of dismissing the top management of a failed thrift at the time of receivership. In those circumstances, there is no factual issue that must be the subject of a due process inquiry. Because respondent had no substantive right to be dismissed only for cause, he had no procedural right to a hearing on that issue. See *Reno* v. *Flores*, 113 S. Ct. 1439, 1449-1450 (1993).

B. Even If Respondent Was Deprived Of A Property Interest, Respondent's Postdeprivation Remedies Provided Him All The Process That Was Due

Even if respondent's state law rights survived Fidelity's takeover by FSLIC, his claim under the Due Process Clause would fail. In *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981), this Court recognized "that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the [government's] action at some time after the initial taking, can satisfy the requirements of procedural due process." See also *Zinermon* v. *Burch*, 494 U.S. 113, 129 (1990); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). The Court in *Parratt* relied on a long line of cases permitting the government to take action that affected private property rights prior to affording a hearing to the owner, where there was need for immediate action. See 451 U.S. at 538-539. The holding of *Parratt* was reaffirmed and extended in *Hudson* v. *Palmer*, 468 U.S. 517 (1984), and the rationale of *Parratt* and *Hudson* govern this case.

1. The "necessity of quick action" mentioned in *Parratt* is always present when a banking institution is threatened with failure. In that situation, federal takeover followed by closure and liquidation of the institution can have grave consequences. When an institution is closed, accounts are frozen, checks are returned, uninsured deposits are generally lost, and even insured deposits may not be paid for a period of months. See, *e.g., NCNB Texas Nat'l Bank* v. *Cowden*, 895 F.2d 1488, 1496 (5th Cir. 1990). The institution loses its value as a going business, and the ultimate costs to the federal insurance fund are correspondingly greater. Not incidentally, all of the institution's employees lose their jobs. Finally, insofar as the closure causes a general loss of public confidence in the banking system, otherwise healthy institutions can be

pushed into failure, with even greater losses to the insurance system and to the economy as a whole.

To avoid simply closing the doors of a failed bank and liquidating its assets, banking authorities frequently arrange for "purchase and assumption" transactions, in which either an existing, healthy financial institution or a newly created one purchases some or all of the assets and assumes some or all of the liabilities of the failed institution, with assistance from the deposit insurance fund. See, *e.g.*, *FDIC* v. *Bank of Boulder,* 911 F.2d 1466, 1469-1471 & nn.1 & 3 (10th Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991). In such a transaction, depositors generally receive uninterrupted service. Such transactions are ordinarily less costly than simple liquidation, and they tend to strengthen—rather than diminish —public confidence in the banking system.

As this Court has recogized, in order to make a purchase and assumption transaction feasible, banking authorities must act "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Langley* v. *FDIC,* 484 U.S. at 91 (internal quotation marks omitted). Although receivers may need to shed excess costs in order to make the institution attractive to a purchaser, immediate termination of the employment of top management is justified by more than merely the need to cut costs. The receiver no longer needs the assistance of top management. And the acquiring institution ordinarily seeks to place its own personnel in charge and is not eager to keep in place the former management, which was responsible for or associated with the policies that led to the institution's failure.

The need for prompt action is inconsistent with providing management employees—as well, presumably, as all other parties whose contracts with the failed institution are repudiated—with predeprivation notice and hearing. This Court recognized that interest when it held that a bank officer may be suspended without a predeprivation hearing where prompt action is necessary "to protect the interests of depositors and to maintain public confidence in our banking institutions." *FDIC* v. *Mallen,* 486 U.S. at 241. In *Mallen,* the officer was suspended pursuant to federal regulations after having been indicted. Although his need for continued employment would appear to have been identical to respondent's in this case, the exigency requiring prompt action was, if anything, substantially less than the need for immediate action here.[28] Similarly, in *Fahey* v. *Mallonee,* 332 U.S. 245 (1947)—one of the cases upon which this Court relied in *Parratt,* see 451 U.S. at 539—this Court held that summary appointment of a federal conservator for an endangered thrift institution did not violate the Due Process Clause, notwithstanding the failure to grant the stockholders a predeprivation hearing. The Court relied on the "delicate nature of the institution and the impossibility of preserving credit during an investigation" as exigencies that justified the summary action. 332 U.S. at 253-254. Compare *First Federal Savings Bank & Trust* v. *Ryan,* 927 F.2d 1345, 1357-1358 (6th Cir.), cert. denied, 112 S. Ct. 187 (1991). The same factors that guided this Court's decisions in *Mallen* and *Fahey* require the federal receiver, once the institution has been seized, to act summarily with respect to employment and other contracts, so that ultimate disposition of the institution as a going concern is possible.[29]

---

[28] See also *Barry* v. *Barchi,* 443 U.S. 55, 65 (1979) (prompt suspension of horse trainer's license necessary to protect "the State's interest in preserving the integrity of the sport and in protecting the public from harm"); *Mackey* v. *Montrym,* 443 U.S. 1 (1979) (suspension of driver's license for refusal to submit to breathalyzer test); *Hewitt* v. *Helms,* 459 U.S. 460, 472 (1983) (confinement of prisoner to administrative segregation); *Mathews* v. *Eldridge,* 424 U.S. 319 (1976) (full-scale predeprivation hearing not required before termination of disability benefits).

[29] Similar exigencies were found to justify summary government action in *Haig* v. *Agee,* 453 U.S. 280, 302 (1981) (denial of passport); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (summary seizure of yacht used for drug smuggling);

This Court's decision in *Cleveland Bd. of Educ.* v. *Loudermill,* 470 U.S. at 542-545, is not to the contrary. In that case, the court held that a predeprivation hearing was necessary before school employees who had an expectation of continued employment were fired. In *Loudermill,* there was no public exigency that required summary removal of the employees from the public payroll. To the contrary, in evaluating the public interest in prompt action, the Court noted that "[i]t is preferable to keep a qualified employee on than to train a new one" and that the government has an "interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls." 470 U.S. at 544. Neither of those factors are applicable to an employee of a failed thrift institution, who has no claim to public funds or public employment. Indeed, the imposition of predeprivation hearing requirements would jeopardize the jobs of the institution's other employees, as well as public confidence in the deposit insurance system, by making it much more difficult to act quickly to preserve as much as possible of the failed institution.

2. Respondent had two distinct postdeprivation remedies available in this case. First, he could have filed a claim with the receiver for the value of any contractual rights he believes to have been violated. Second, he could have filed suit in federal court against the receiver to assert any such claim. Those remedies provided respondent with all the process he was due.

a. At the time of the events in this case, FSLIC's governing statute and regulations provided for the determi-

Ewing v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 600 (1950) (seizure of misbranded drugs); *Bowles* v. *Willingham,* 321 U.S. 503, 521 (1944) (wartime rent control); *Stoehr* v. *Wallace,* 255 U.S. 239 (1921) (seizure of aliens' property during wartime); *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554 (1921) (same); *Phillips* v. *Commissioner,* 283 U.S. 589 (1931) (summary collection of taxes due); *North American Cold Storage Co.* v. *City of Chicago,* 211 U.S. 306 (1908) (seizure of diseased meat).

nation of claims submitted to it as receiver of state-chartered institutions such as Fidelity. 12 U.S.C. 1729(d) (1988); 12 C.F.R. 569a.6, 569a.7 (1982). There was no bar to respondent's submission of a claim to the receiver for any contract violation that he believed had been committed, and there is no basis for believing that respondent's claim, if valid, would not have been allowed by FSLIC. See generally *Coit Independence Joint Venture* v. *FSLIC,* 489 U.S. at 580-581.

Respondent has asserted in this litigation that the claims process was inadequate. In respondent's view, FSLIC's failure to create suitable claim forms and publish a notice concerning their availability violated FSLIC's own regulations governing the claims process. See, *e.g.,* Resp. Br. in Opp. 14-15 n.2.

Respondent's view is mistaken. The regulation that required creation of forms and publication of notice to creditors was 12 C.F.R. 569a.8 (1982), which provided for creditors to be told that they must submit claims on specified forms on or before a specified date. That regulation, however, did not apply to purchase and assumption transactions, such as the one that took place when Fidelity was placed in receivership and its assets were purchased by the newly chartered Fidelity Federal. Under 12 C.F.R. 569a.13 (1982), "[t]he requirements set forth in [section 569a.8] shall not apply to the Corporation as receiver for an institution that becomes the subject of a purchase and assumption transaction." [30] Accordingly, respondent was free to submit a claim and upon its approval would have received its value out of the receivership estate on a pro rata basis with any other creditors. See 12 C.F.R. 569a.7 (1982).

[30] A FSLIC official testified at a deposition that no notice was published because the transaction was a purchase and assumption transaction and that "the receiver will consider" any claim that is not transferred to the purchaser of the institution. Deposition of Lawrence Hayes, 7/2/87, at 31. He also testified that there would be no time limit applicable to such a claim. *Id.* at 32.

b. Aside from the administrative claims process, this Court made clear in *Coit* that respondent could have filed a claim in federal court against the receiver for breach of contract, and the court would have been required to provide him with a *de novo* determination of that claim. See 489 U.S. at 578-579. Indeed, Count 8 of Meyer's First Amended Complaint in this case—which he later dropped—pleaded just such a claim against FSLIC. C.A. Excerpts of Record 11.[31] Accordingly, regardless of whether the claims process was available to respondent, the federal court remedy provided him fully adequate process to obtain relief for any contractual violation.

In *Parratt* and *Hudson*, this Court held that state tort remedies provided all the process that was due for unauthorized deprivations of property interests by state actors. There is no reason not to extend that analysis to cases such as this one, in which a postdeprivation suit for breach of contract provides a fully adequate remedy.

First, although this Court's cases have recognized the need for a prompt remedy in cases involving termination of employment, that need has arisen in each case in part from the possibility that the employee could be reinstated—or continued—in his job if the termination proved unjustified. See, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230 (1988); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. at 543; *Barry* v. *Barchi*, 443 U.S. at 66 (1979). In this case, as in other receivership situations, respondent's former employer went out of business on the day the receiver was appointed and thus had neither the need nor the capability to continue to employ him. Thus, the

[31] FSLIC's trial counsel moved to dismiss that Count on the ground (erroneous, in our view) that under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491(a)(1), only the Claims Court would have had jurisdiction over respondent's breach of contract claim. Respondent neither filed suit in the Claims Court nor continued to litigate the district court's jurisdiction over his claim for breach of contract. Instead, he simply dropped the breach of contract claim when he filed his Second Amended Complaint, see J.A. 17-46, before the district court had any occasion to reach the issue.

most that is at issue in this case is respondent's right to contract damages. As *Parratt* and *Hudson* make clear, a claim for damages is precisely the sort of claim that under traditional principles can "adequately redress the loss." *Zinermon* v. *Burch*, 494 U.S. at 129.[32] Indeed, it would be astonishing if a suit for damages were inadequate under the Due Process Clause to redress a purely monetary claim.[33]

Second, a postdeprivation suit for breach of contract is especially well suited to receivership situations. Even assuming that respondent retained a right to continued employment even after his employer went into receivership, that interest under California law is simply a right to sue for breach of contract. See Pet. App. 20a-21a n.17, 22a-23a n.18 (both quoting *Foley* v. *Interactive Data Corp.*, 765 P.2d 373, 401-402 (Cal. 1988)). There is no basis for granting respondent preferred status with respect to other contract creditors of the employer's estate; remitting respondent to the same remedy that is available to other creditors permits a full determination of each claim and a rational distribution of the estate's assets.

Finally, this Court has held that procedures that may easily take at least as long as a federal court suit satisfy

[32] In the analogous bankruptcy setting, due process requires only that a party injured by the repudiation of a contract have the opportunity to submit a claim—not to demand specific performance—that will be paid in accordance with whatever reasonable priorities are fixed by law. See, *e.g.*, *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451-452 (1937); *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 680-681 (1935); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181 (1902).

[33] Any other result would convert every claim of government breach of contract remediable only by litigation into a violation of the Due Process Clause, thereby inappropriately making that Clause "a font of [contract] law to be superimposed upon whatever systems may already be administered." *Parratt* v. *Taylor*, 451 U.S. at 544 (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976)).

due process requirements. For example, in *Mathews* v. *Eldridge*, the postdeprivation process at issue included initial agency review of a disability determination, followed by an evidentiary hearing before an administrative law judge, discretionary review by an appeals council, and judicial review in district court. 424 U.S. at 339. The Court's holdings in *Parratt* and *Hudson* necessarily rest on similar findings.

c. In sum, even if respondent was deprived of a property interest, the receivership claims process and the possibility of a contract suit in federal court provided constitutionally adequate remedies. In light of those remedies, respondent's claim fails to state a constitutional violation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
JEROME A. MADDEN
Attorneys
Federal Deposit Insurance Corporation

MAY 1993

APPENDIX

STATUTORY PROVISIONS

1. 28 U.S.C. 1346(b) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2677 provides:

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

3. 28 U.S.C. 2679(a) and (b) provide:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for in-

jury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

4. 28 U.S.C. 2680 provides, in pertinent part:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse

of process, libel slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omission of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

5. 12 U.S.C. 1725(c) (1988) provided, in pertinent part:

On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

* * * * *

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60272